Supreme Court, U.S.
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No. 95-1363

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In The

Supreme Court of the United States

October Term, 1995

IN RE:

IRFM, INC., A CALIFORNIA CORPORATION, FORMERLY DBA IRVINE RANCH FARMERS MARKET,

Debtor.

ROBERT P. MOSIER, CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATE OF IRFM, INC.,

Petitioner,

vs.

THE KROGER COMPANY, AN OHIO CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Former section 546(a)(1) of Title 11 of the United States Code allows a bankruptcy trustee appointed under Bankruptcy Code §§ 702, 1104, 1163, 1302, or 1202 two (2) years from his/her appointment to commence an avoidance action under section 544, 545, 547, 548 or 549. Did the Ninth Circuit err in concluding that section 546(a)(1) does not apply to the first statutorily appointed trustee in bankruptcy cases originally filed under Chapter 11, but subsequently converted to Chapter 7?

LIST OF PARTIES

The parties to the proceedings below were:

Petitioner:

Robert P. Mosier, Chapter 7 Trustee for the bankruptcy estate of IRFM, Inc., formerly dba Irvine Ranch Farmers Market.

Respondent:

The Kroger Company, an Ohio corporation.

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Robert P. Mosier, Chapter 7 Trustee for the bankruptcy estate of IRFM, Inc. (hereinafter the "Petitioner" or "Trustee"), prays that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on September 12, 1995 and subsequently amended on November 27, 1995.

OPINIONS BELOW

After a trial on the merits of Petitioner's claim to avoid preferential transfers (pursuant to 11 U.S.C. § 547) in the amount of $676,963.61 on March 23, 1993, the Bankruptcy Court for the Central District of California entered judgment in favor of the Respondent (hereinafter the "Bankruptcy Court Judgment"). The Bankruptcy Court Judgment and the Findings of Fact and Conclusions of Law related thereto were not published, and are reprinted as Appendix D and E to this Petition, respectively, at 24a and 29a, respectively.

Petitioner timely appealed the Bankruptcy Court Judgment to the District Court for the Central District of California. On January 30, 1994, the District Court for the Central District of California entered its Ruling on Appeal (hereinafter the "District Court Ruling"). While the District Court affirmed the Bankruptcy Court Judgment, it did so on the ground that the action was barred by Bankruptcy Code § 546(a)(1) since it was commenced more than two (2) years from the *commencement of the Chapter 11 case*. The District Court looked exclusively to the date the Chapter 11 case was commenced and not the date on which the Petitioner was appointed as Chapter 7 trustee. The District Court did not consider the merits of the underlying action. The District Court Ruling was not published and is reprinted as Appendix C to this Petition, as 19a.

The District Court Ruling was appealed by the Petitioner to

the Court of Appeals for the Ninth Circuit. On September 12, 1995, the Court of Appeals for the Ninth Circuit rendered its opinion, affirming the District Court Ruling. The Ninth Circuit opinion is reprinted as Appendix B to this petition, at 10a.

On September 25, 1995, the Petitioner timely filed his Petition for Rehearing and Suggestion for Rehearing En Banc (hereinafter the "Petition for Rehearing"). On November 27, 1995, the Ninth Circuit denied the Petition for Rehearing and published an Amended Opinion. The Amended Opinion is reported at 65 F.3d 778 (9th Cir. 1995) and reprinted as Appendix A to this Petition, at 1a.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals for the Ninth Circuit was entered on September 12, 1995, affirming the judgments in favor of the Respondent entered by the District Court and the Bankruptcy Court. The Ninth Circuit denied Petitioner's timely Petition for Rehearing on November 27, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED[1]

Former 11 U.S.C. § 546(a)[2] provided:

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1. On July 22, 1988, IRFM, Inc. filed its petition under Chapter 11 of Title 11 of the United States Code. In 1994 Congress enacted the Bankruptcy Reform Act of 1994, which amended section 546(a)(1), however said amendment was not to have retroactive effect. It is important for the Court to note that, notwithstanding the 1994 Amendments, former section 546(a)(1) will have a continued and pervasive impact on the 40,383 still pending Chapter 11 cases filed prior to October 22, 1994, not to mention the portion of the still pending 508,631 total bankruptcy cases that were converted to Chapter 7 from

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> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of —
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or
>
> (2) the time the case is closed or dismissed.

STATEMENT OF THE CASE

At issue in this case is the statute of limitations under section 546(a)(1) of the Bankruptcy Code, which the Fourth, Fifth, Seventh and Eighth Circuit Courts of Appeal[3] have concluded plainly means that a trustee who is appointed under Bankruptcy Code §§ 702, 1104, 1163, 1302 or 1202 has two (2) years from his/her appointment date to commence avoidance actions. On the other hand, the Ninth Circuit, in the present case, ruled that the statute of limitations beginsto run, not from the appointment of the trustee, but from the date the bankruptcy petition was filed. This ruling is significant since rarely is there an appointed trustee

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Chapter 11. (Statistics were obtained from the Administrative Office of the United States Courts, Statistics Division). It is very likely that the former section 546(a)(1) will still have applicability for at least ten (10) years.

2. The Bankruptcy Reform Act of 1994 modified Bankruptcy Code § 546(a)(1) for all cases filed after October 22, 1994.

3. *In re Maxway Corp.*, 27 F.3d 980 (4th Cir. 1994); *In re MortgageAmerica Corp.*, 831 F.2d 97 (5th Cir. 1987); *Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799 (7th Cir. 1995); *McCuskey v. Central Trailer Services, Inc., Ltd.*, 37 F.3d 1329 (8th Cir. 1994).

in a Chapter 11 case. Most often, as in the present case, it is not until a case is converted to a Chapter 7 case that a trustee is appointed. Since Chapter 11 cases often linger for two (2) years or more before being converted to Chapter 7 and, the overwhelming number of avoidance actions are commenced by appointed trustees rather than debtors operating under Chapter 11, the Ninth Circuit ruling will eliminate a vast number of avoidance actions, to the detriment of the creditors the avoidance powers were intended to protect.

In addition to the four (4) Circuit Courts of Appeal, an overwhelming majority of the Bankruptcy Courts and District Courts throughout the country have concluded that the two (2) year statute of limitations begins to run upon the appointment of the first statutory trustee.[4] However, notwithstanding the majority view prevalent throughout the Courts of Appeal, Bankruptcy Courts and District Courts, the Ninth Circuit has created a *divergence among the Circuits*.

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4. *See In re C & R Beer & Soda*, 186 B.R. 173 (Bankr. E.D.N.Y. 1995); *In re Wingspread Corp.*, 186 B.R. 803 (S.D.N.Y. 1995); *In re Midway Indus. Cont., Inc.*, 184 B.R. 551 (Bankr. N.D. Ill. 1995); *In re Tower Metal Alloy*, 183 B.R. 502 (Bankr. S.D.Ohio 1995); *In re Allen Care Centers, Inc.*, 182 B.R. 49 (D. Or. 1995); *In re Dryland Marina, Inc.*, 180 B.R. 487 (Bankr. W.D. Mich. 1995); *Stoebner v. Vaughan*, 179 B.R. 600 (D.Minn. 1995); *In re California Canners & Growers*, 175 B.R. 346 (Bankr. 9th Cir. 1994); *In re Goetz*, 175 B.R. 743 (Bankr. C.D.Cal. 1995); *In re T.G. Morgan, Inc.*, 175 B.R. 702 (Bankr. D. Minn. 1994); *In re Superior Toy and Mfg. Co.*, 175 B.R. 693 (Bankr. N.D. Ill. 1994); *In re California Canners & Growers*, 172 B.R. 941 (N.D. Cal. 1994); *In re Farrell and Howard Auctioneers, Inc.*, 172 B.R. 712 (Bankr. D. Mass. 1994); *In re Ted A. Petras Furs, Inc.*, 172 B.R. 170 (Bankr. E.D.N.Y. 1994); *In re CVA Assoc.*, 171 B.R. 122 (D. Utah 1994); *In re Brook Meade Health Care Center, Inc.*, 165 B.R. 195 (Bankr. M.D. Tenn. 1994); *In re Iron-Oak Supply Corp.*, 162 B.R. 301 (Bankr. E.D. Cal. 1993); *Marshack v. Mesa Valley Farms L.P. (In re The Ridge II)*, 158 B.R. 1016 (Bankr. C.D. Cal. 1993); *Daff v. Regal Recovery (In re Continental Capital & Credit, Inc.)*, 158 B.R. 828 (Bankr. C.D. Cal. 1993); *In re D-Mart Svcs., Inc.*, 138 B.R. 985 (Bankr. D. Utah 1992).

This Court's guidance is needed to establish a uniform interpretation of section 546(a)(1), so that bankruptcy trustees will be able to determine, with certainty, the effect of section 546(a)(1) on the commencement or continuation of avoidance actions. Without a uniform statute of limitations, bankruptcy trustees throughout the nation will be left to guess when the limitations period on avoidance actions begins and ends.

The facts underlying the Ninth Circuit's affirmation of the District Court Ruling center on the dates of certain events which occurred during the course of the bankruptcy. IRFM, Inc., a California corporation, formerly dba Irvine Ranch Farmers Market (hereinafter the "Debtor"), filed a petition under Chapter 11 of the Bankruptcy Code on July 22, 1988. The Debtor proceeded as a debtor-in-possession for more than fourteen (14) months. (*See* 11 U.S.C. §1102). No Chapter 11 trustee was appointed. (*See* 11 U.S.C. § 1104). On October 3, 1989, the case was converted to one under Chapter 7 of the Bankruptcy Code and the Petitioner was appointed Chapter 7 trustee on October 14, 1989.

The underlying action was commenced by the Petitioner on October 11, 1991 for the avoidance and recovery of $676,963.61 in allegedly preferential transfers (hereinafter the "Transfers"), pursuant to Bankruptcy Code §§ 547 and 550. The Bankruptcy Court had jurisdiction to hear the Petitioner's Complaint pursuant to 28 U.S.C. §§ 157 and 1334. The Debtor made the Transfers to The Kroger Company, an Ohio corporation (hereinafter the "Respondent" or "Kroger") during the one (1) year prior to July 22, 1988. On March 23, 1993, the Bankruptcy Court, the Honorable John E. Ryan presiding, after receiving evidence and hearing oral argument from counsel at trial, entered the Bankruptcy Court Judgment in favor of the Respondent finding thatthe Transfers could not be avoided, since the Respondent had a complete ordinary course of business defense under Bankruptcy Code § 547(c)(2).[5]

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5. Judge Ryan specifically found that Petitioner's action *was not barred*
(Cont'd)

The Trustee timely filed his Notice of Appeal on March 26, 1993.[6] On appeal to the District Court,[7] the Honorable Gary L. Taylor presiding, Petitioner contended that the Bankruptcy Court erred in finding that Respondent had a complete ordinary course of business defense. On the other hand, Respondent argued that the Bankruptcy Court committed error by denying his pre-trial motion made on the grounds that the action was time barred by section 546(a)(1). On January 30, 1994, the District Court affirmed the Bankruptcy Court Judgment, finding that Petitioner's claims were barred by the statute of limitations, since the action was not commenced until more than two (2) years after the Chapter 11 petition was filed. The District Court did not address the issues regarding the ordinary course of business defense.

On January 31, 1994, Petitioner timely filed his Notice of Appeal to the Court of Appeals for the Ninth Circuit.[8] On September 12, 1995, the Ninth Circuit, relying primarily on *In re Softwaire Centre International, Inc.*, 994 F.2d 682 (9th Cir.

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by any applicable statute of limitations. See Findings of Fact and Conclusions of Law, Appendix E at 36a.

6. Petitioner initially appealed to the Bankruptcy Appellate Panel of the Ninth Circuit, however, upon objection by the Respondent, the reference to the Bankruptcy Appellate Panel was withdrawn and the appeal ultimately proceeded in the District Court.

7. The District Court had jurisdiction to consider the appeal pursuant to 28 U.S.C. §158(a), which grants the District Court jurisdiction to hear appeals from final judgments of the bankruptcy courts.

8. The Ninth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 158(d), which grants the circuit courts of appeals jurisdiction to hear appeals from final decisions of the district courts pursuant to 28 U.S.C. §§ 158 (a) and (b).

1993), *In re Century Brass Products, Inc.*, 22 F.3d 37 (2d Cir. 1994), *In re Coastal Group, Inc.*, 13 F.3d 81 (3d Cir. 1994)and *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520 (10th Cir. 1990), affirmed the District Court Ruling finding that the statute of limitations began to run at the filing of the Chapter 11 petition, notwithstanding the fact that the Petitioner was the first statutorily appointed trustee.[9]

On September 25, 1995, the Petitioner timely filed the Petition for Rehearing and Suggestion for Rehearing En Banc. On November 27, 1995, the Ninth Circuit denied the Petition for Rehearing and rejected the Petitioner's Suggestion for Rehearing En Banc. Concurrently, the Ninth Circuit amended its initial opinion.[10] *In re IRFM, Inc.*, 65 F.3d 778 (9th Cir. 1995).

The Ninth Circuit not only disregarded the plain meaning of section 546(a)(1), but its reliance on the above-referenced cases was misplaced in that none of those cases involved appointed trustees, but rather only concerned the statute of limitations for debtors-in-possession.[11] In fact, each of those courts were

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9. The court also relied on *In re San Joaquin Roast Beef*, 7 F.3d 1413 (9th Cir. 1993). However, as set forth in detail below, the Ninth Circuit's decision in the present case is in direct conflict with its decision in *San Joaquin Roast Beef*.

10. The opinion was amended by the addition of the following statement: "*San Joaquin Roast Beef* did not address the applicability of section 546(a)(1) to debtors-in-possession."

11. In so relying, the Ninth Circuit wrongfully equated a debtor-in-possession with a trustee appointed under one of the enumerated sections in section 546(a)(1). In that regard, it is well established that a debtor-in-possession is substantially different from a Chapter 7 trustee in that debtors-in-possession "are not likely to commence avoidance actions, if for no other reason, because they are normally more interested in preserving relationships with their creditors than in maximizing the size of the estate." *In re Maxway Corp.*, 27 F.3d 980, 984 (4th Cir. 1994).

very careful not to extend their rulings to cases with appointed trustees.[12] As set forth more fully hereinbelow, the Ninth Circuit's mistaken reliance on these cases has resulted in an irreconcilable conflict with the Ninth Circuit's prior decision in *In re San Joaquin Roast Beef*, 7 F.3d 1413 (9th Cir. 1993) and a direct conflict with decisions in four (4) other Circuit Courts who have ruled on this issue.

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit's holding that section 546(a)(1) barred the Petitioner's claim has created conflicts on three (3) different fronts which must be resolved:

(1) The Ninth Circuit Ruling directly conflicts with decisions in the Fourth, Fifth, Seventh and Eighth Circuits regarding the proper application of section 546(a)(1);

(2) The Ninth Circuit ruling is in direct conflict with this Court's decisions which require courts to apply the plain meaning of statutes; and

(3) The decision irreconcilably conflicts with the Ninth

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12. *See* the Second Circuit's decision in *Century Brass Products, Inc.*, 22 F.3d at 41 ("[S]ince no trustee was ever appointed in the present case, we need not decide whether such appointment might revive a claim that the DIP itself would have been barred frombringing."); the Third Circuit's decision in *Coastal Group, Inc.*, 13 F.3d at 86, n. 7 ("We do not need to reach the question whether a trustee appointed more than two years after the Chapter 11 case began may commence adversary proceedings."); the Tenth Circuit's decision in *Zilkha Energy Co.*, 920 F.2d at 1524, n. 11 ("We take no position on whether a subsequent appointment of a trustee in a chapter 11 case would change the analysis. While we perceive that to be a distinguishable circumstance requiring different analysis, we leave the issue for a case in which that situation arises."); the Ninth Circuit's decision in *Softwaire Centre*, 994 F.2d at 683 ("Here the case has not been closed or dismissed, nor has a trustee been appointed. Instead, SCI is a debtor in possession.").

Circuit's prior decision in *San Joaquin Roast Beef*, which held that even in cases originally filed as a Chapter 11, the first appointed trustee has two (2) years from the appointment, regardless of when the bankruptcy was commenced. *In re San Joaquin Roast Beef*, 7 F.3d 1413 (9th Cir. 1993).

These conflicts must be resolved to ensure a uniform application of bankruptcy law.[13] Further, to fulfill their fiduciary duties to their respective estates and the creditors thereto, bankruptcy trustees must have a clear and definite statement as to the applicable statute of limitations, which ought to be the two (2) years as authorized by Congress.

This Court has long held that questions regarding the determination of the appropriate statutes of limitations for the enforcement of federal laws warrant the issuance of a writ of certiorari. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987) (certiorari granted to resolve the important question of the appropriate statute of limitations for civil enforcement actions brought under RICO); *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985) (certiorari granted to resolve the conflict, confusion and uncertainty concerning the appropriate statute of limitations to apply in civil rights case); *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979) (certiorari granted to resolve the important question of the statute of limitations which is essential to the administration of a statute concerning medical malpractice); *United States v. Hougham*, 364 U.S. 310, 81 S. Ct. 13, 5 L. Ed. 2d 8 (1961) (certiorari granted to answer important questions concerning the application of the statute of limitations regarding the Surplus Property Act).

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13. The United States Constitution provides, in pertinent part, at Article I, section 8, "The Congress shall have Power . . . to establish uniform laws on the subject of Bankruptcies throughout the United States . . ."

Similarly, in the present case, the divergence among the Circuits, created by the Ninth Circuit's refusal to follow the statute's plain meaning, threatens the proper administration of the Bankruptcy Code. This Court's intervention is required to ensure, if not, restore the integrity of a section of the Bankruptcy Code which, despite having been amended by Congress, continuesand will continue to have significant importance to a great number of bankruptcy cases filed prior to October 22, 1994. (*See* Footnote No. 1, *supra*).

I.

A WRIT OF CERTIORARI SHOULD ISSUE TO CURE A LACK OF UNIFORMITY AMONG THE CIRCUITS ON AN ISSUE OF FEDERAL BANKRUPTCY LAW.

One of the primary purposes of this Court's certiorari jurisdiction is to ensure uniformity of decisions among the courts of appeals, particularly on an issue of federal law. *Arco Corp. v. Aero Lodge 735*, 390 U.S. 557, 559, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968); *Northeastern National Bank v. United States*, 387 U.S. 213, 217, 87 S. Ct. 1573, 18 L. Ed. 2d 726 (1967); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163, 43 S. Ct. 5311, 67 L. Ed. 922 (1922).

Here, the issue presented involves a square conflict among five (5) Circuits. [*See* Table 1 provided as Appendix F to this Petition, at 40a]. The Fourth, Fifth, Seventh and Eighth Circuits have held that the statute of limitations commences upon the appointment of the first statutory trustee, regardless of when the Chapter 11 case was filed. *In re Maxway Corp.*, 27 F.3d 980 (4th Cir. 1994); *In re MortgageAmerica Corp.*, 831 F.2d 97 (5th Cir. 1987); *Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799 (7th Cir. 1995); *McCuskey v. Central Trailer Services, Inc., Ltd.*, 37 F.3d 1329 (8th Cir. 1994).

In *Maxway Corp.* , the Fourth Circuit held:

> [T]he language of Sec. 546(a)(1) is plain; it provides that the two-year statute of limitations for bringing an avoidance action does not begin to run until the appointment of one of the trustees specified in Sec. 546(a)(1).

Maxway Corp., 27 F.3d at 984.

In *MortgageAmerica*, the Fifth Circuit held:

> We agree that the limitations period under section 546(a) should commence consistent with the appointment of the trustee through a written order.

MortgageAmerica, 831 F.2d at 98.

In *Gleischman*, the Seventh Circuit concurred with the Fourth Circuit and held that the statute of limitations commences only upon the appointment of a statutory trustee. Specifically, the *Gleischman* court stated:

> [W]e conclude that the literal reading is superior, and that the statute of limitations in § 546(a)(1) applies to trustees exclusively.

Gleischman, 69 F.3d at 800.

Finally, in *McCuskey* the Eighth Circuit held that the limitations period starts from the date that the first trustee is appointed. Specifically, the *McCuskey* court stated in pertinent part:

> In particular, we agree that a plain reading of section 546(a) is that the two-year statute of limitations begins running from the date the first trustee is appointed and that all subsequent trustees are subject to the same two-year statute of limitations.

McCuskey, 37 F.3d at 1332.

The Fourth, Fifth, Seventh and Eighth Circuits have all agreed that the plain language of section 546(a)(1) clearly, concisely and unequivocally states that the statute of limitations commences upon the appointment of the first statutory trustee. The Ninth Circuit's Ruling has created a divergence in the interpretation of a national bankruptcy law that should be uniformly applied throughout all circuits. Only with this Court's intervention, can uniformity be restored.

II.

THE DECISION IN THE PRESENT CASE IS IN DIRECT CONFLICT WITH THE CANONS OF STATUTORY CONSTRUCTION ESTABLISHED BY THIS COURT.

Bankruptcy Code § 546(a)(1) is clear and concise. It unequivocally provides that the two-year statute of limitations for bringing an avoidance action does not run until two (2) years from a trustee's appointment under Bankruptcy Code §§ 702, 1104, 1163, 1302, or 1202. There is no reference whatsoever to the date of the commencement of the bankruptcy. The Ninth Circuit's holding that the statute of limitations commenced when the petition was filed, even where a statutory trustee is appointed, violates elementary canons of statutory construction established by this Court. To that end, this Court has held that in

interpreting legislation, courts should presume that a statute means exactly what it says. Specifically, in *Connecticut National Bank v. Germain*, 503 U.S. 249, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992), this Court stated:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. *We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there*. See, *e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242, 109 S.Ct. 1026, 1030-1031, 103 L.Ed.2d 290 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103, 18 S.Ct. 3, 4, 42 L.Ed. 394 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68, 3 L.Ed. 150 (1810). *When the words of a statute are unambiguous, then this first canon is also the last: "judicial inquiry is complete." Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981); see also *Ron Pair Enterprises, supra*, 489 U.S., at 241, 109 S.Ct., at 1030. (emphasis added).

Id. 503 U.S. at 253, 112 S.Ct. at 1149.

Moreover, the Ninth Circuit's interpretation of section 546(a)(1) further violates this Court's canons of construction by eliminating the "after the appointment of a trustee" language from the statute. Under the Ninth Circuit's decision in the present case, the statute of limitations no longer commences "after the appointment of a trustee" but rather at the filing of the bankruptcy petition. In that regard, this Court's decision in *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596

(1979) definitively stated that it is impermissible to construe a statute in such a fashion. Specifically, this Court stated:

> [It is an] elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.

Id., 439 U.S. at 392.

In *Ron Pair Enterprises, Inc.*, this Court stated that the plain meaning of Bankruptcy Code provisions should be "conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " *Ron Pair Enterprises, Inc.*, 109 S.Ct. at 1031. The clear and concise terms of section 546(a)(1) must be deemed conclusive that a trustee has two (2) years from the appointment to commence an avoidance action. The Court's intervention is required to ensure that the plain meaning of the section 546(a)(1) is given its full effect.

III.

THE NINTH CIRCUIT'S HOLDING IN THE PRESENT CASE CREATES A DIRECT CONFLICT WITHIN THE CIRCUIT.

Prior to the decision in the present case, the Ninth Circuit ruled that the statute of limitations under section 546(a)(1) did not commence upon the filing of a Chapter 11 petition where a statutory trustee was appointed. Rather, as the statute provides, the limitations period commences upon the appointment of the first trustee. *San Joaquin Roast Beef*, 7 F.3d at 1413. In *San Joaquin*, where like the present case, the debtor operated without the appointment of a trustee for a lengthy period of time, the Ninth Circuit held:

> [T]he most logical interpretation of section 546(a) is that the statute of limitations begins running from the date the first trustee is appointed and that all subsequent trustees are subject to the same statute of limitations.

San Joaquin, 7 F.3d at 1415.

Notwithstanding *San Joaquin's* holding, on facts indistinguishable from the present case, the Ninth Circuit concluded in this case that the section 546(a)(1) statute of limitations commenced at the filing of the bankruptcy petition, even where a statutory trustee had been appointed.

Recently, the Ninth Circuit has attempted to reconcile its decisions in the present case with its prior decisions in *San Joaquin* and *Softwaire Centre*. In *In re Hanna*, 72 F.3d 114 (9th Cir. 1995), the Ninth Circuit held:

> Therefore, under our cases and the pre-amended version of section 546, there are two distinct two-year limitations periods for avoidance actions subject to section 546(a). Adebtor-in-possession gets two years from the date the case is filed. If a Chapter 11 trustee is actually appointed, the limitations period restarts and all trustees get two years from the date that the Chapter 11 trustee was first appointed. If no Chapter 11 trustee is appointed, the limitations period expires two years after the date on which the petition was filed.

Id. at 117.

In an attempt to reconcile the present case, the Ninth Circuit added that a Chapter 7 trustee, even if he/she is the first appointed trustee, *is not afforded a new two-year statute of limitations*. The end result of *Hanna* is that in the Ninth Circuit, Chapter 11 trustees are vested with greater rights than Chapter 7 trustees (*i.e.*, Chapter 11 trustees enjoy a new two-year limitation period, while Chapter 7 trustees do not). Nowhere in Bankruptcy Code § 546(a)(1), is there any justification for the Ninth Circuit's reasoning in *Hanna*. It is readily apparent that the confusion and uncertainty that has been created within the Ninth Circuit is not likely to be resolved absent this Court's guidance.

IV.

THE BANKRUPTCY REFORM ACT OF 1994 DOES NOT RENDER THIS ISSUE MOOT.

The Bankruptcy Reform Act of 1994 amended section 546(a)(1). However, Congress did not provide for retroactive application of the amendment to section 546(a)(1).[14] Therefore, all bankruptcy cases, and in particular all Chapter 11 bankruptcy cases, filed prior to October 22, 1994 are governed by former section 546(a)(1). Statistics obtained from the Administrative Office of the United States Courts, Statistics Division indicate that there are no less than Five Hundred Eight Thousand Six Hundred Thirty One (508,631) pending bankruptcy cases filed prior to October 1, 1994.[15] Of those, Forty Thousand Three

14. If Congress had, in fact, provided for retroactive application, the Petitioner concedes that the present issue would be moot. However, the fact that Congress did not so provide is another compelling reason for this Court to grant certiorari so that the proper application of this federal bankruptcy law can be established.

15. These statistics do not reflect bankruptcy cases filed from October 1, 1994 up to and including October 21, 1994. As such, it is a logical conclusion that said statistics *underestimate* the number of affected cases.

Hundred Eighty Three (40,383) are Chapter 11 bankruptcy cases, of which a staggering Twelve Thousand Three Hundred Thirty Three (12,333) (approximately 31%) were filed in the Ninth Circuit.

The above statistics are proof positive that the issue presented to this Court is not moot. Thousands of bankruptcy cases will continue to be governed and affected by former section 546(a)(1).

CONCLUSION

WHEREFORE, Petitioner Robert P. Mosier, Chapter 7 Trustee, prays that a writ of certiorari issue from this Honorable Court to review the judgment of the Court of Appeals for the Ninth Circuit in *In re IRFM, Inc. (Mosier v. The Kroger Co.)*. In the event that the petition is granted, Petitioner prays that the judgment of the Court of Appeals for the Ninth Circuit be reversed and the cause be remanded back to the District Court for a determination of the ordinary course of business defense and solvency issues which were raised on appeal, but left unresolved.

Respectfully submitted,

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APPENDIX A — ORDER AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 12, 1995 AND AMENDED NOVEMBER 27, 1995

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 94-55235

D.C. NO.
CV-93-00396-GLT

In re: IRFM, INC.,

Debtor.

ROBERT P. MOSIER, Trustee,

Plaintiff-Appellant,

v.

KROGER COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

ORDER AND AMENDED OPINION

Appendix A

Submitted July 12, 1995*
Pasadena, California

Filed September 12, 1995
Amended November 27, 1995

Before: Jerome Farris and Diarmuid F. O'Scannlain, Circuit Judges; A. Wallace Tashima,** District Judge.

Opinion by Judge O'Scannlain

SUMMARY

Bankruptcy/Litigation and Procedure (Civil)/ Liquidation (Chapter 7)

The court of appeals affirmed a district court judgment. The court held that, under the pre-1994 version of the Bankruptcy Code, the statute of limitations for a Chapter 7 trustee to bring an avoidance action began running from the time the debtor's Chapter 11 bankruptcy petition was filed.

In July 1988, IRFM, Inc. filed a Chapter 11 bankruptcy petition. IRFM served as a debtor-in-possession. No Chapter 11 trustee was appointed. The case was converted to a Chapter 7

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* The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

** The Honorable A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

bankruptcy. On October 14, 1989, appellant Robert Mosier was appointed as the Chapter 7 trustee.

On October 11, 1991, Mosier filed a complaint to recover allegedly preferential transfers from IRFM to appellee Kroger Co. The district court, reviewing an appeal from the bankruptcy court, held that Mosier's action was barred by the statute of limitations because it was not brought within two years after the filing of IRFM's Chapter 11 petition. Mosier appealed, contending that the statute of limitations began running anew at the time he was appointed Chapter 7 trustee.

The reasoning of two prior Ninth Circuit cases compelled the conclusion that the statute of limitations began running in this case at the time the Chapter 11 petition was filed. One of the previous cases stood for the proposition that a Chapter 11 debtor-in-possession is the "functional equivalent of an appointed trustee," and the statute of limitations begins running from the date of the Chapter 11 petition. The other case stood for the proposition that the statute of limitations does not start anew when there is a conversion to a Chapter 7 bankruptcy.

COUNSEL

Michael G. Spector, Marshack & Goe, Santa Ana, California, for the plaintiff-appellant.

Roger A. Ferree, Arter & Hadden, Los Angeles, California, for the defendant-appellee.

Appendix A

ORDER

The slip opinion filed on September 12, 1995 at slip op. 11437 shall be amended as follows:

Slip op. 11442: insert the following after the first sentence of the first full paragraph: "*San Joaquin Roast Beef* did not address the applicability of section 546(a)(1) to debtors-in-possession."

The panel has voted to deny the petition for rehearing. Judge O'Scannlain voted to reject the suggestion for rehearing en banc; Judges Farris and Tashima so recommend.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the statute of limitations under the pre-1994 version of the Bankruptcy Code begins running — for a Chapter 7 trustee to bring an avoidance action — from the time the bankruptcy petition is filed or from the time the trustee is appointed.

Appendix A

I

The relevant dates in this case are as follows:

On July 22, 1988, IRFM, Inc. filed a Chapter 11 bankruptcy petition.

On October 3, 1989, the case was converted to a Chapter 7 bankruptcy.

On October 14, 1989, Robert Mosier was appointed as the Chapter 7 trustee.

On October 11, 1991, Mosier filed the complaint in this suit pursuant to 11 U.S.C. § 547 to recover $676,963.61 in allegedly preferential transfers from IRFM to Kroger Company.

The applicable statute of limitations for such actions is two years. 11 U.S.C. § 546(a). Measured from the date the Chapter 11 petition was filed, Mosier's suit was too late. Measured from the date of his appointment as Chapter 7 trustee, however, the suit was just in time.

The district court, reviewing an appeal from the bankruptcy court, held that Mosier's action was barred by the statute of limitations because it was not brought within two years after IRFM's Chapter 11 petition was filed. Mosier timely appealed.

II

Mosier's action for recovery of preferential transfers was brought under 11 U.S.C. § 547, which is governed by the statute of limitations set forth in 11 U.S.C. § 546(a). At the time, section 546(a) provided in relevant part:

Appendix A

> An action or proceeding under [section 547] of this title may not be commenced after the earlier of —
>
> (1) two years after the appointment of a trustee under [section 702] of this title; or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a).[1]

---

1. We deal here only with the version of 11 U.S.C. § 546(a) in effect at the time of the relevant events. In 1994, section 546(a) was amended as follows:

> An action or proceeding under [§ 547] of this title may not be commenced after the earlier of —
>
> (1) the later of —
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under [§ 702] of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

Any ambiguity that existed in the statute has thus been resolved. The debtor-in-possession has two years from the entry of the order of relief to commence an avoidance action, and a trustee, if appointed in that two-year period, has one year from appointment to commence an avoidance action. In this case, the statute of limitations would have expired one year after Mosier's appointment.

Appendix A

Mosier claims the statute of limitations began running anew at the time he was appointed Chapter 7 trustee and not, as the district court held, at the time the Chapter 11 petition was filed. The resolution of this issue is dictated by two Ninth Circuit cases interpreting section 546(a) — *In re San Joaquin Roast Beef*, 7 F.3d 1413 (9th Cir. 1993), and *In re Softwaire Centre International, Inc.*, 994 F.2d 682 (9th Cir. 1993).

In *San Joaquin Roast Beef*, a Chapter 11 trustee had been appointed and was subsequently replaced by a Chapter 7 trustee after the bankruptcy was converted. We held that "the most logical interpretation of section 546(a) is that the statute of limitations begins running from the date the first trustee is appointed and that all subsequent trustees are subject to the same statute of limitations." 7 F.3d at 1415. We therefore concluded that "[t]he statute of limitations began running on the date the Chapter 11 trustee was appointed." *Id.* at 1416. *See also McCuskey v. Central Trailer Servs., Ltd.*, 37 F.3d 1329, 1332 (9th Cir. 1994) ("[T]he two-year statute of limitations did not begin to run anew with the appointment of the chapter 7 trustee.").

The Chapter 7 trustee, like Mosier here, had argued that the conversion from Chapter 11 to Chapter 7 should start the statute of limitations running anew. As he pointed out, a Chapter 7 trustee has different objectives than a Chapter 11 trustee — while the latter has the goal of rehabilitating the debtor business, the former has the goal of liquidating the business at its maximum value. As a result, a Chapter 7 trustee could be time-barred from instituting adversary actions due to the inaction of a prior Chapter 11 trustee. We declined to dabble in the field of bankruptcy policy, however. Instead, the court expressly rejected the trustee's arguments, stating that "[t]he issue is laden with policy considerations best left to Congress." *San Joaquin Roast Beef*, 7 F.3d at 1416.

Appendix A

This case is similar to *San Joaquin Roast Beef* except that IRFM served as a debtor-in-possession during its Chapter 11 status, and no Chapter 11 trustee was appointed. *San Joaquin Roast Beef* did not address the applicability of section 546(a)(1) to debtors-in-possession. The question is thus whether a Chapter 11 debtor-in-possession is treated differently an a Chapter 11 trustee for statute of limitations purposes. The second Ninth Circuit case answers this question.

In *Softwaire Centre*, a Chapter 11 debtor-in-possession filed an action seeking an avoidance more than two years after the Chapter 11 petition had been filed. We held that section 546(a)'s statute of limitations "was intended to apply to debtors in a possession as well as trustees." 994 F.2d at 684. We adopted the reasoning of *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1523-24 (10th Cir. 1990), which construed section 546(a) in light of section 1107(a) ("[A] debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee."). In light of this language, we concluded that "[w]e do not believe that Congress intended to limit actions filed by an appointed trustee to two years without making the same restriction apply to a debtor in possession who is the functional equivalent of an appointed trustee." *Softwaire Centre*, 994 F.2d at 684. The statute of limitations therefore began to run "from the date of the filing of a petition for reorganization under Chapter 11." *Id.* at 683 (quoting *Zilkha*, 920 F.2d at 1524). *See also In re Century Brass Prods., Inc.*, 22 F.3d 37, 40 (2d Cir. 1994) ("§ 546(a) applies to preference-avoidance actions brought by [debtors-in-possession] as well as to those brought by trustees."); *In re Coastal Group Inc.*, 13 F.3d 81, 84 (3d Cir. 1994) (same).

The reasoning of *Softwaire Centre* and *San Joaquin Roast*

Beef compels us to the conclusion that the statute of limitations began running in this case at the time the Chapter 11 petition was filed.[2] *Softwaire Centre* stands for the proposition that a Chapter 11 debtor-in-possession is "the functional equivalent of an appointed trustee," 994 F.2d at 684, and that the statute of limitations starts running from the date of the Chapter 11 petition. And, *San Joaquin Roast Beef* stands for the proposition that the statute of limitations does not start anew when there is a conversion to a Chapter 7 bankruptcy. Adding these two cases together, the statute of limitations in this case began running on July 22, 1988, the date IRFM filed its Chapter 11 bankruptcy petition. The fact that IRFM's petition was subsequently converted to a Chapter 7 bankruptcy, and a Chapter 7 trustee appointed, did not start the clock ticking anew.

AFFIRMED.

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2. A district court and a bankruptcy court in this circuit have reached the same conclusion, *see In re Sahuaro Petroleum & Asphalt Co.*, 170 B.R. 689, 692 (C.D. Cal. 1994) ("[T]he § 546(a)(1) limitations period commenced on the [Chapter 11] petition date . . ."); *In re EPI Prods. USA, Inc.*, 162 B.R. 1, 4-5 (Bkrtcy. C.D. Cal. 1993) ("[T]he two-year statute of limitations prescribed in Section 546(a) commenced on the date of the filing of the original Chapter 11 Petition . . . [T]he appointment of . . . the Chapter 7 Trustee did not commence a new two year period of time."), while the Bankruptcy Appellate Panel has not, *see In re California Canners & Growers*, 175 B.R. 346, 348 (9th Cir. BAP 1994).

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 12, 1995

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-55235

D.C. No.
CV-93-00396-GLT

In re: IRFM, INC.,

Debtor.

ROBERT P. MOSIER, Trustee,

Plaintiff-Appellant,

v.

KROGER COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

OPINION

Appendix B

Submitted July 12, 1995*
Pasadena, California

Filed September 12, 1995

Before: Jerome Farris and Diarmuid F. O'Scannlain, Circuit Judges; A. Wallace Tashima,** District Judge.

Opinion by Judge O'Scannlain

SUMMARY

Bankruptcy/Litigation and Procedure (Civil)/ Liquidation (Chapter 7)

The court of appeals affirmed a district court judgment. The court held that, under the pre-1994 version of the Bankruptcy Code, the statute of limitations for a Chapter 7 trustee to bring an avoidance action began running from the time the debtor's Chapter 11 bankruptcy petition was filed.

In July 1988, IRFM, Inc. filed a Chapter 11 bankruptcy petition. IRFM served as a debtor-in-possession. No Chapter 11 trustee was appointed. The case was converted to a Chapter 7 bankruptcy. On October 14, 1989, appellant Robert Mosier was appointed as the Chapter 7 trustee.

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* The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

** The Honorable A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

Appendix B

On October 11, 1991, Mosier filed a complaint to recover allegedly preferential transfers from IRFM to appellee Kroger Co. The district court, reviewing an appeal from the bankruptcy court, held that Mosier's action was barred by the statute of limitations because it was not brought within two years after the filing of IRFM's Chapter 11 petition. Mosier appealed, contending that the statute of limitations began running anew at the time he was appointed Chapter 7 trustee.

The reasoning of two prior Ninth Circuit cases compelled the conclusion that the statute of limitations began running in this case at the time the Chapter 11 petition was filed. One of the previous cases stood for the proposition that a Chapter 11 debtor-in-possession is "the functional equivalent of an appointed trustee," and the statute of limitations begins running from the date of the Chapter 11 petition. The other case stood for the proposition that the statute of limitations does not start anew when there is a conversion to a Chapter 7 bankruptcy.

COUNSEL

Michael G. Spector, Marshack & Goe, Santa Ana, California, for the plaintiff-appellant.

Roger A. Ferree, Arter & Hadden, Los Angeles, California, for the defendant-appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the statute of limitations under the pre-1994 version of the Bankruptcy Code begins running — for

a Chapter 7 trustee to bring an avoidance action — from the time the bankruptcy petition is filed or from the time the trustee is appointed.

I

The relevant dates in this case are as follows:

On July 22, 1988, IRFM, Inc. filed a Chapter 11 bankruptcy petition.

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On October 14, 1989, Robert Mosier was appointed as the Chapter 7 trustee.

On October 11, 1991, Mosier filed the complaint in this suit pursuant to 11 U.S.C. § 547 to recover $676,963.61 in allegedly preferential transfers from IRFM to Kroger Company.

The applicable statute of limitations for such actions is two years. 11 U.S.C. § 546(a). Measured from the date the Chapter 11 petition was filed, Mosier's suit was too late. Measured from the date of his appointment as Chapter 7 trustee, however, the suit was just in time.

The district court, reviewing an appeal from the bankruptcy court, held that Mosier's action was barred by the statute of limitations because it was not brought within two years after IRFM's Chapter 11 petition was filed. Mosier timely appealed.

Appendix B

II

Mosier's action for recovery of preferential transfers was brought under 11 U.S.C. § 547, which is governed by the statute of limitations set forth in 11 U.S.C. § 546(a). At the time, section 546(a) provided in relevant part:

> An action or proceeding under [section 547] of this title may not be commenced after the earlier of —
>
> (1) two years after the appointment of a trustee under [section 702] of this title; or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a).[1]

---

1. We deal here only with the version of 11 U.S.C. § 546(a) in effect at the time of the relevant events. In 1994, section 546(a) was amended as follows:

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(Cont'd)

Appendix B

Mosier claims the statute of limitations began running anew at the time he was appointed Chapter 7 trustee and not, as the district court held, at the time the Chapter 11 petition was filed. The resolution of this issue is dictated by two Ninth Circuit cases interpreting section 546(a) — *In re San Joaquin Roast Beef*, 7 F.3d 1413 (9th Cir. 1993), and *In re Softwaire Centre International Inc.*, 994 F.2d 682 (9th Cir. 1993).

In *San Joaquin Roast Beef*, a Chapter 11 trustee had been appointed and was subsequently replaced by a Chapter 7 trustee after the bankruptcy was converted. We held that "the most logical interpretation of section 546(a) is that the statute of limitations begins running from the date the first trustee is appointed and that all subsequent trustees are subject to the same statute of limitations." 7 F.3d at 1415. We therefore concluded that "[t]he statute of limitations began running on the date the Chapter 11 trustee was appointed." *Id.* at 1416. *See also McCuskey v. Central Trailer Servs., Ltd.*, 37 F.3d 1329, 1332 (9th Cir. 1994) ("[T]he two-year statute of limitations did not begin to run anew with the appointment of the chapter 7 trustee.").

(Cont'd)

before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

Any ambiguity that existed in the statute has thus been resolved. The debtor-in-possession has two years from the entry of the order of relief to commence an avoidance action, and a trustee, if appointed in that two-year period, has one year from appointment to commence an avoidance action. In this case, the statute of limitations would have expired one year after Mosier's appointment.

The Chapter 7 trustee, like Mosier here, had argued that the conversion from Chapter 11 to Chapter 7 should start the statute of limitations running anew. As he pointed out, a Chapter 7 trustee has different objectives than a Chapter 11 trustee — while the latter has the goal of rehabilitating the debtor business, the former has the goal of liquidating the business at its maximum value. As a result, a Chapter 7 trustee could be time-barred from instituting adversary actions due to the inaction of a prior Chapter 11 trustee. We declined to dabble in the field of bankruptcy policy, however. Instead, the court expressly rejected the trustee's arguments, stating that "[t]he issue is laden with policy considerations best left to Congress." *San Joaquin Roast Beef*, 7 F.3d at 1416.

This case is similar to *San Joaquin Roast Beef* except that IRFM served as a debtor-in-possession during its Chapter 11 status, and no Chapter 11 trustee was appointed. The question is thus whether a Chapter 11 debtor-in-possession is treated differently than a Chapter 11 trustee for statute of limitations purposes. The second Ninth Circuit case answers this question.

In *Softwaire Centre*, a Chapter 11 debtor-in-possession filed an action seeking an avoidance more than two years after the Chapter 11 petition had been filed. We held that section 546(a)'s statute of limitations "was intended to apply to debtors in possession as well as trustees." 994 F.2d at 684. We adopted the reasoning of *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1523-24 (10th Cir. 1990), which construed section 546(a) in light of section 1107(a) ("[A] debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee."). In light of this language, we concluded that "[w]e do not believe that Congress intended to limit actions filed by an appointed trustee to two years without making the

same restriction apply to a debtor in possession who is the functional equivalent of an appointed trustee." *Softwaire Centre*, 994 F.2d at 684. The statute of limitations therefore began to run "from the date of the filing of a petition for reorganization under Chapter 11." *Id.* at 683 (quoting *Zilkha*, 920 F.2d at 1524). *See also In re Century Brass Prods., Inc.*, 22 F.3d 37, 40 (2d Cir. 1994) ("§ 546(a) applies to preference-avoidance actions brought by [debtors-in-possession] as well as to those brought by trustees."); *In re Coastal Group Inc.*, 13 F.3d 81, 84 (3d Cir. 1994) (same).

The reasoning of *Softwaire Centre* and *San Joaquin Roast Beef* compels us to the conclusion that the statute of limitations began running in this case at the time the Chapter 11 petition was filed.[2] *Softwaire Centre* stands for the proposition that a Chapter 11 debtor-in-possession is "the functional equivalent of an appointed trustee," 994 F.2d at 684, and that the statute of limitations starts running from the date of the Chapter 11 petition. And, *San Joaquin Roast Beef* stands for the proposition that the statute of limitations does not start anew when there is a conversion to a Chapter 7 bankruptcy. Adding these two cases together, the statute of limitations in this case began running on

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2. A district court and a bankruptcy court in this circuit have reached the same conclusion, *see In re Sahuaro Petroleum & Asphalt Co.*, 170 B.R. 689, 692 (C.D. Cal. 1994) ("[T]he § 546(a)(1) limitations period commenced on the [Chapter 11] petition date . . ."; *In re EPI Prods. USA, Inc.*, 162 B.R. 1, 4-5 (Bkrtcy. C.D. Cal. 1993) ("[T]he two-year statute of limitations prescribed in Section 546(a) commenced on the date of the filing of the original Chapter 11 Petition . . . [T]he appointment of . . . the Chapter 7 Trustee did not commence a new two year period of time."), while the Bankruptcy Appellate Panel has not, *see In re California Canners & Growers*, 175 B.R. 346, 348 (9th Cir. BAP 1994).

Appendix B

July 22, 1988, the date IRFM filed its Chapter 11 bankruptcy petition. The fact that IRFM's petition was subsequently converted to a Chapter 7 bankruptcy, and a Chapter 7 trustee appointed, did not start the clock ticking anew.

AFFIRMED.

APPENDIX C — RULING ON APPEAL OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED JANUARY 18, 1994

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

District Court Case No.
SACV 93-396-GLT

Bankruptcy Case No.
SA 88-04423-JR

Adversary No.
SA 91-3921-JR

In re:

IRFM, Inc.,

Debtor.

Robert P. Mosier,

Appellant,

vs.

Kroger Company,

Appellee.

Appendix C

Appeal from the Bankruptcy Court, Central District of California. AFFIRMED.

RULING ON APPEAL

Appellant, a Chapter 7 trustee, seeks to recover $676,963.61 in allegedly preferential transfers made by the Debtor IRFM Inc., doing business as Irvine Ranch Farmers Market, to the Appellee, the Kroger Company ("Kroger"). The Bankruptcy Court ruled that Mosier's prosecution of this action was not barred by the applicable statute of limitations. However, the court concluded that the transfers were incurred in the ordinary course of business, and therefore, pursuant to 11 U.S.C. 547(c)(2), could not be avoided by the Chapter 7 trustees as a preferential transfer.

Appellee Kroger appeals the Bankruptcy Court's decision regarding the statute of limitations.[1] Appellant Mosier appeals

---

1. Mosier argues that Kroger has waived the statute of limitations argument because it failed to file a cross appeal as required by Bankruptcy Rule 8006. In addition, Mosier cites *In re Pine Mountain Ltd.*, 80 B.R. 171, 173 (9th Cir. BAP 1987) for the proposition that failure to notify a party of issues intended to be appealed constitutes a waiver of the issue for purposes of the appeal.

Kroger has not waived its statute of limitations argument. The Ninth Circuit has indicated that a cross-appeal is needed only when a party seeks to change or add to the relief afforded below, but not when a party merely seeks to sustain a judgment for reasons presented at trial but not relied upon by the trial judge (or even determined by the judge adversely to the appellee). An Appellee may urge any matter appearing in the record to support a judgment." *Waterman Steamship Corporation v. Gay Cottons*, 414 F.2d 724, 735 (9th Cir. 1969) (citations omitted). Here, the court below ruled in Kroger's favor. Kroger did not have to file a cross-appeal and can raise any issue, including the running of the statute of limitations, to support the judgment of the Bankruptcy Court.

the application of the ordinary course of business defense. This court has appellate jurisdiction pursuant to 28 U.S.C. 158(b)(1).

I. BACKGROUND

IRFM filed a Petition for Reorganization under Chapter 11 of the Bankruptcy Code on July 22, 1988. On October 3, 1989, this case was converted into a liquidation proceeding pursuant to Chapter 7 of the Bankruptcy Code. Appellant was appointed Chapter 7 trustee on October 14, 1989. The Complaint was filed by the Appellant on October 11, 1991, more than three years after IRFM filed its Chapter 11 petition.

II. DISCUSSION

On appeal, Kroger renews its argument that Mosier's complaint is time-barred. The parties agree that the applicable statute of limitations is set forth in 11 U.S.C. 546(a) which states:

> (a) An action or proceeding under section 544, 545, 547, 548 or 553 of this title may not be commenced after the earlier of —
>
> > (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or
> >
> > (2) the time the case is closed or dismissed.

11 U.S.C. 546.

Appendix C

Below, Kroger argued that the Mosier's complaint was time-barred because more than two years had elapsed between the filing of the complaint and the date in which the Chapter 11 petition was filed. Kroger relied on the Tenth Circuit decision in *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1524 (10th Cir. 1990) which held that section 546(a)(1) applies to debtors in possession as well as trustees. The Bankruptcy Court refused to follow *Zilkha* and held that Mosier's complaint was not time-barred because it was filed within two years of the date in which Mosier was appointed Chapter 7 trustee. The Bankruptcy Court's legal conclusions are subject to "de novo" review. *In re Windmill Farms, Inc.*, 841 F.2d 1467, 1469 (9th Cir. 1988).

After the Bankruptcy Court ruled, the Ninth Circuit Court of Appeals issued two decisions which clarify the application of the limitations period set forth in section 546(a)(1). In *In re Softwaire Centre International, Inc.*, 994 F.2d 682 (9th Cir. 1993), the Ninth Circuit followed *Zilkha*, and held that debtors-in-possession as well as trustees are subject to a two-year limitations period. In *In re San Joaquin Roast Beef*, 7 F.3d 1413 (9th Cir. 1993), it was held that the two-year limitations period for a bankruptcy trustee to bring an adversary proceeding did not begin to run anew after a proceeding was converted from Chapter 11 to Chapter 7 and a new trustee was appointed. The "statute of limitations begins running from the date the first trustee is appointed and all subsequent trustees are subject to the same statute of limitations." *In re San Joaquin*, 7 F.3d at 1415.

Together, *In re Softwaire* and *In re San Joaquin* mandate the dismissal of Mosier's complaint. Here, IRFM was a debtor-in-possession when the Chapter 11 petition was filed. According to *In re Softwaire*, debtors in possession as well as trustees are subject to a two year statute of limitations. *In re San Joaquin*

indicates that a chapter 7 trustee is subject to the limitations period faced by an earlier trustee. Together, these cases compel the result that a Chapter 7 trustee is subject to the limitations period faced by an earlier trustee or debtor-in-possession. Because more than two years elapsed between the time of the filing of the Chapter 11 petition and the filing of the complaint by the Chapter 7 trustee, Mosier's complaint is time-barred.

This result is supported by the reasoning of *In re San Joaquin*. In reaching its conclusion that all trustees are subject to the same limitations period faced by the first trustee, the court rejected the argument that the different duties of Chapter 11 and Chapter 7 trustees mandate that each successor trustee be subject to a separate two-year statute of limitations. Although the facts of *In re San Joaquin* involved successor trustees, its reasoning is equally applicable to situations where a trustee succeeds to a debtor-in-possession.

It is therefore unnecessary to review the Bankruptcy Court's holding regarding the usual course of business defense.

III. DISPOSITION

For the reasons stated above, the decision of the Bankruptcy Court is AFFIRMED.

DATED: January 18, 1994

s/ Gary L. Taylor
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX D — JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED MARCH 17, 1993

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. SA 88-04423-JR

Chapter 7

In re RFM, INC., a California Corporation, fdba IRVINE RANCH FARMERS MARKET,

Debtor.

Adv. No. SA 91-3921-JR

ROBERT P. MOSIER, Chapter 7 Trustee,

Plaintiff,

vs.

KROGER COMPANY, an Ohio Company,

Defendant.

JUDGMENT

DATE: February 1, 1993
TIME: 4:00 P.M.
PLACE: Courtroom 520

Appendix D

This action came on regularly for trial before the Honorable John E. Ryan, Judge presiding without a jury, on January 19 and 27, 1993 and February 1, 1993. Michael G. Spector, Esq. of Fabozzi, Prenovost & Normandin appeared for the Plaintiff, Robert P. Moiser ("Plaintiff"), Chapter 7 Trustee for the Debtor IRFM, Inc. ("IRFM"). Roger A. Ferree, Esq. of Arter, Hadden, Lawler, Felix & Hall appeared for the Defendant, The Kroger Co. ("Kroger").

The Court, having considered the evidence admitted at trial and the arguments of counsel, having considered the papers on file and being fully advised in the premises, and the Court having signed its Findings of Fact and Conclusions of Law and there being no reason why Judgment should not be entered,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED THAT:

(1) Kroger is entitled to Judgment on the Complaint and the Complaint is dismissed with prejudice; and

(2) Kroger shall have and recover its costs of suit.

DATED MAR 17 1993

s/ JOHN E. RYAN
John E. Ryan
United States Bankruptcy Judge

Appendix D

Submitted by:

ROGER A. FERREE
DOUGLAS C. FABRICK
ARTER, HADDEN, LAWLER, FELIX & HALL
700 South Flower Street, 30th Floor
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(213) 629-9300

Attorneys for Defendant, The Kroger Co.

Appendix D

PROOF OF SERVICE MY MAIL
(Section 1013a, Section 2015.5 C.C.P)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I, Helen Danielson, am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and not a party to the within entitled action; my business address is 700 South Flower Street, Los Angeles, California 90017.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 10, 1993, I served the within JUDGMENT [PROPOSED] on the interested party in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as follows:

Michael G. Spector, Esq.
Fabozzi, Prenovost & Normandin
2020 E. First Street, Ste. 500
Santa Ana, CA 92705

OFFICE OF U.S. TRUSTEE
600 W. Santa Ana Blvd., Ste. 501
Santa Ana, CA 92701

I declare under penalty of perjury that the foregoing is true and correct.

Appendix D

Executed on February 10, 1993, at Los Angeles, California.

s/ Helen Danielson
Helen Danielson

APPENDIX E — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES BANKRUPTCY COURT FOR THE THE CENTRAL DISTRICT OF CALIFORNIA FILED MARCH 17, 1993

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. SA 88-04423-JR

Chapter 7

In re

IRFM, INC., a California corportion, fdba IRVINE RANCH FARMERS MARKET,

Debtor.

Adv. No. SA 91-3921-JR

ROBERT P. MOSIER, Chapter 7 Trustee,

Plaintiff,

vs.

KROGER COMPANY, an Ohio Company,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appendix E

DATE: February 1, 1993
TIME: 4:00 P.M.
PLACE: Courtroom 520

[Local Rule 116]

This action came on regularly for trial before the Honorable John E. Ryan, Judge presiding without a jury, on January 19 and 27, 1993 and February 1, 1993. Michael G. Spector, Esq. of Fabozzi, Prenovost & Norandin appeared for the Plaintiff, Robert P. Moiser ("Plaintiff"), Chapter 7 Trustee for the Debtor IRFM, Inc. ("IRFM"). Roger A. Ferree, Esq. of Arter, Hadden, Lawler, Felix & Hall appeared for the Defendant, The Kroger Co. ("Kroger").

The Court, having considered the evidence admitted at trial and the arguments of counsel, having considered the papers on file and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On October 10, 1991, the Trustee filed his subject Complaint by which he sought to recover from Kroger the sum of $676,963.61 as an avoidable preference under Section 547 of the Bankruptcy Code.

2. The payments sought to be avoided ("Payments") were the following:

Appendix E

Due Date	Received	Amount
7/02/87	7/29/87	$12,459.45
7/29/87	8/19/87	$41,531.51
8/19/87	9/16/87	$ 41,531.51
8/26/87	9/29/87	$41,531.51
8/27/87	10/08/87	$20,765.76
9/10/87	10/20/87	$41,531.51
10/02/87	11/04/87	$12,459.45
10/29/87	11/30/87	$41,531.51
11/03/87	11/30/87	$ 8,306.30
11/19/87	12/28/87	$41,531.51
11/26/87	1/05/88	$41,531.51
11/27/87	1/14/88	$20,765.76
12/10/87	2/23/88	$41,531.51
1/02/88	3/10/88[1]	$12,459.45
1/29/88	4/06/88[2]	$41,531.51

1. The initial due date of 1/2/88 was extended at the request of IRFM on 2/16/88 to 3/2/88.

2. The initial due date of 1/29/88 was extended at the request of IRFM 2/16/88 to 3/16/88. On 3/29/88, IRFM requested that the due date be extended to 4/6/88.

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2/05/88	4/20/88[3]	$8,306.30
2/19/88	3/04/88	$41,531.51
2/26/88	3/10/88	$41,531.51
2/27/88	4/20/88[4]	$20,765.76
3/10/88	4/28/88[5]	$41,531.51
4/02/88	5/04/88[6]	$12,459.45
4/29/88	5/18/88[7]	$41,531.51
5/05/88	5/03/88[8]	$8,306.30
Total		$676,963.61

3. The transaction underlying the Payments occurred or

---

3. The initial due date of 2/5/88 was extended at the request of IRFM on 2/16/88 to 3/30/88. On 3/29/88, IRFM requested that the due date be extended to 4/13/88.

4. The initial due date of 2/27/88 was extended at the request of IRFM on 3/29/88 to 4/20/88.

5. The initial due date of 3/10/88 was extended at the request of IRFM on 3/29/88 to 4/27/88.

6. The initial due date of 4/2/88 was extended at the request of IRFM on 3/29/88 to 5/4/88.

7. The initial due date of 4/29/88 was extended at the request of IRFM on 3/29/88 to 5/18/88.

8. The initial due date of 5/5/88 was extended at the request of IRFM on 3/29/88 to 5/25/88.

about March 5, 1986, at which time Kroger purchased a 20% equity interest in IRFM for $2,000,000 and agreed to loan IRFM $5,000,000. Pursuant to seven (7) promissory notes, Kroger in fact loaned to IRFM the total sum of $5,000,000.

4. Between March 5, 1986 and July 22, 1987, one year before IRFM filed its Chapter 11 Petition for a Reorganization under the Bankruptcy Code, IRFM made the following payments on account of the loans made by Kroger:

Due Date	Received	Amount
5/19/86	5/23/86	$41,531.51
6/10/86	6/11/86	$41,531.51
8/19/86	8/20/86	$41,531.51
9/10/86	9/11/86	$41,531.51
10/29/86	11/5/86	$41,531.51
11/19/86	11/25/86	$41,531.51
11/27/86	12/15/86	$20,765.76
12/10/86	12/29/86	$41,531.51
1/2/87	1/19/87	$12,459.45
1/29/87	2/13/87	$41,531.51
2/19/87	3/10/87	$41,531.51
2/27/87	3/13/87	$20,765.76
3/10/87	4/1/87	$41.531.51
4/2/87	5/1/87	$12,459.45

Appendix E

4/29/87	5/13/87	$41,531.51
5/19/87	5/29/87	$41,531.51
5/27/87	6/16/87	$20,765.76
6/10/87	6/26/87	$41,531.51

5. IRFM was in the business of owning and operating up-scale food retail establishments. The loans were made to IRFM and the corresponding debts to repay these loans were incurred by IRFM because of its almost insatiable need for cash to finance the acquisition and operation of new stores.

6. A part of Kroger's business is making investment loans (loaning money to food retailers and purchasing an equity interest in those retailers) to new or expanding businesses, such as IRFM, and the loan made by Kroger to IRFM was not unusual for industries of this type.

7. The Payments made by IRFM to Kroger were made in he ordinary course of business of both IRFM and Kroger. The Loans made by Kroger were not made to a mature borrower characterized by stable revenues. Rather, IRFM was undergoing rapid growth which materially affected its cash needs. For this reason, the timing of IRFM's repayment was not as predictable as it otherwise might be. It was understood by Kroger that there was a need to approach their relationship with flexibility and that, in order to achieve IRFM's purposes in obtaining these loans and Kroger's expectation of getting paid. From the beginning, IRFM was late in making its Payments to Kroger, but Kroger accepted these Payments as an accommodation to IRFM in order to facilitate the workability and success of the overall transaction.

Appendix E

8. Kroger did not take at any time an adversarial position with respect to IRFM's late Payments. While Kroger, because of a change in its management, wished to withdraw from the lending relationship in July, 1987, it made no attempt to manipulate IRFM to make the Payments and it made no threats to IRFM to cause Payments to be made on a timely basis. At all times, the decision as to whom to pay and how much to pay was left with IRFM.

9. The Payments were made by IRFM to Kroger in accordance with ordinary business terms. This was not a bank loan, but an investment loan coupled with an equity position in a company which was undergoing rapid growth, in which mutual cooperation and flexibility were required. This was not a unique situation, but normal for the segment of the lending industry in which this transaction took place.

10. At the time the Payments were made, Kroger was a 20% shareholder of IRFM. However, the Payments were not a function or result of Kroger's status as a 20% shareholder, or because Kroger exerted any control over IRFM to cause the payments to be made.

11. As of November 30, 1987, and from that point forward to July 22, 1988 (the date that IRFM filed its Chapter 11 Petition), IRFM was not a going concern. IRFM was not paying its debts in a timely manner, had substantial cash flow problems, had no financing, Kroger was seeking to withdraw from its lending relationship with IRFM, and IRFM's auditors questioned IRFM's viability as a going concern.

12. As of November 30, 1987, and from that point forward to July 22, 1988, IRFM was insolvent on a liquidation basis since

the assets of IRFM at a fair valuation, were less than its liabilities.

13. The Payments received by Kroger were more than Kroger would have received as a distribution under Chapter 7 of the Bankruptcy Code if they had not been made.

CONCLUSIONS OF LAW

14. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 157 and 1334, and this is a core proceeding under 28 U.S.C. § 157(b)(2)(H).

15. The Complaint is not barred by any applicable Statute of Limitations.

16. Kroger was an "insider" of IRFM at the time the Payments were made.

17. As of November 30, 1987 and from that point forward to July 22, 1988, IRFM was insolvent in that its assets, at a fair valuation, were less than its liabilities.

18. The Payments were made on account of antecedent debts.

19. The Payments received by Kroger enabled Kroger to receive more than it would receive under Chapter 7 of the Bankruptcy Code if the Payments had not been made.

20. Kroger has no set-off rights because of their payment of obligations of IRFM which were incurred pursuant to the Perishable Agricultural Commodities Act.

Appendix E

21. The debts in respect of which the Payments were made were incurred by IRFM in the ordinary course of business or financial affairs of IRFM and Kroger.

22. The Payments were made in the ordinary course of business or financial affairs of IRFM and Kroger.

23. The payments were made according to ordinary business terms.

24. Kroger is entitled to judgment.

25. Any matter characterized herein as a Finding of Fact but which is a Conclusion of Law, shall be so interpreted and characterized, and any matter characterized herein as a conclusion of Law but which is a Finding of Fact, shall be so interpreted and characterized.

DATED: MAR 17 1993

s/ JOHN E. RYAN
John E. Ryan
United States Bankruptcy Judge

Submitted by:

ROGER A. FERREE
DOUGLAS C. FABRICK
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Attorneys for Defendant, The Kroger Co.

Appendix E

PROOF OF SERVICE BY MAIL
(Section 1013a, Section 2015.5 C.C.P)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I, Helen Danielson, am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and not a party to the within entitled action; my business address is 700 South Flower Street, Los Angeles, California 90017.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 10, 1993, I served the within FINDINGS OF FACT AND CONCLUSIONS OF LAW [PROPOSED] on the interested party in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California addressed as follows:

Michael G. Spector, Esq.
Fabozzi, Prenovost & Normandin
2020 E. First Street, Ste. 500
Santa Ana, CA 92705

OFFICE OF THE U.S. TRUSTEE
600 W. Santa Ana Blvd., Ste. 501
Santa Ana, CA 92701

I declare under penalty of perjury that the foregoing is true and correct.

Appendix E

Executed on February 10, 1993, at Los Angeles, California.

s/ Helen Danielson
Helen Danielson

APPENDIX F — TABLE 1 - THE SPLIT AMONG THE CIRCUITS

CIRCUIT COURTS OF APPEAL THAT HAVE HELD THAT THE SECTION 546(a)(1) STATUTE OF LIMITATIONS COMMENCES UPON THE APPOINTMENT OF THE FIRST STATUTORY TRUSTEE	CIRCUIT COURTS OF APPEAL THAT HAVE HELD THAT THE SECTION 546(A)(1) STATUTE OF LIMITATIONS COMMENCES AT THE FILING OF THE BANKRUPTCY PETITION
In re Marway Corp., 27 F.3d 980 (4th Cir. 1994) In re MortgageAmerica Corp., 831 F.2d 97 (5th Cir. 1987) Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar, 69 F.3d 799 (7th Cir. 1995) McCuskey v. Central Trailer Services, Inc., Ltd., 37 F.3d 1329 (8th Cir. 1994).	In re JREM, Inc., 63 F.3d 778 (9th Cir. 1995)

(2)

No. 95-1363

Supreme Court, U.S.
FILED
APR 25 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

In Re:

IRFM, INC., A CALIFORNIA CORPORATION, FORMERLY DBA IRVINE RANCH FARMERS MARKET,

Debtor.

ROBERT P. MOSIER, CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATE OF IRFM, INC.,

Petitioner,

vs.

THE KROGER COMPANY, AN OHIO CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Prior to the 1994 Amendments to the Bankruptcy Code, 11 U.S.C. § 546(a) provided that preference actions under § 547 of the Code must be brought within two years of the appointment of a trustee under the Bankruptcy Code; 11 U.S.C. § 1107(a) provides that a Chapter 11 debtor-in-possession is "[s]ubject to any limitations on a trustee serving in a case under this chapter." The issue presented is whether in a Chapter 11 proceeding commenced prior to October 22, 1994, wherein the debtor remains in possession, the two-year statute of limitations to bring a preference avoidance action commences anew upon conversion of the case from Chapter 11 to Chapter 7 such that the appointed Chapter 7 Trustee is given two additional years to bring preference actions regardless of when the case was filed, which could occur five, ten or even more years after the commencement of the bankruptcy case.

LIST OF INTERESTED PARTIES

The parties to the proceedings below were Petitioner, Robert P. Mosier, Chapter 7 Trustee for the bankruptcy estate of IRFM, Inc., formerly dba Irvine Ranch Farmers Market, and Respondent The Kroger Co.

Respondent is a Corporation formed in the State of Ohio whose shares are publicly traded. Pursuant to Rule 29.6, Respondent has no Parent Corporations or non-wholly owned subsidiaries.

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II. A split amongst the Circuit Courts of Appeals in interpreting pre-amended Code § 546(a) has de minimis impact, affecting less than 1% of the cases pending as of December 31, 1995.	5
III. The Ninth Circuit Court of Appeals correctly interpreted pre-amended § 546(a) of the Bankruptcy Code.	6
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Respondent The Kroger Co., an Ohio Corporation, respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the opinion of the Court of Appeals for the Ninth Circuit reported at 65 F.3d 778 (9th Cir. 1995).

STATEMENT OF THE CASE

At issue in this case is the statute of limitations for the commencement of an avoidance action under § 546(a)(1) of the Bankruptcy Code as it existed prior to the amendment of § 546(a)(1) by the Bankruptcy Reform Act of 1994. The Ninth Circuit held that in a case commenced as a Chapter 11 proceeding, where the debtor remains in possession, the statute of limitations for the commencement of an avoidance action under pre-amended § 546(a)(1) started to run at the time of the entry of the Order for Relief and did not start anew upon conversion of the case to a Chapter 7 proceeding.

Given the amendment by Congress to § 546(a)(1), wherein Congress clarified § 546(a)(1) and thus remedied the Circuit Courts' inconsistent interpretations of pre-amended § 546(a)(1), the impact of the decision in this case will be of limited significance. Likewise, the traditional rules of statutory construction and the stated purposes behind statutes of limitations (*i.e.*, finality, certainty and the right to be free of stale claims) dictate that the Ninth Circuit reached the correct result in its interpretation of pre-amended § 546(a)(1).

REASONS FOR DENYING THE WRIT

I.

THE BANKRUPTCY REFORM ACT OF 1994 OBVIATES THE NEED TO RESOLVE ANY CONFLICT OVER THIS ISSUE AMONG THE CIRCUIT COURTS OF APPEALS.

Respondent acknowledges that the decision of the Ninth Circuit Court of Appeals reported at 65 F.3d 778 (9th Cir. 1995), *In re IRFM*, conflicts with decisions in the Fourth, Fifth, and Seventh Circuits[1]; however, because of the enactment on October 22, 1994 of the Bankruptcy Reform Act of 1994 (the "1994 Reform Act"), resolution of this conflict by this Court would be merely academic and have de minimis impact.

Prior to its amendment by § 216 of the 1994 Reform Act, § 546(a) of the Bankruptcy Code provided as follows:

> An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of —
>
> . . . . . .
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302 or 1202 of this title; or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a) (prior to 1994 amendments).

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1. *In re Maxway Corp.*, 27 F.3d 980 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 580, 130 L. Ed. 2d 495 (1994); *In re Mortgage America Corp.*, 831 F.2d 97 (5th Cir. 1987); *Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799 (7th Cir. 1995).

Along with the Ninth Circuit, the Second, Third, and Tenth Circuits have found that Bankruptcy Code § 546(a)(1) applies to debtors in possession, and that the statute of limitations begins to run against the debtor in possession upon the filing of the bankruptcy petition.[2] Likewise, the Eighth, Ninth, and Tenth Circuit Courts of Appeals have held that the two year statute of limitations does not begin to run anew upon conversion of the Chapter 11 case to Chapter 7.[3]

Congress has remedied the Circuit Courts' inconsistent interpretations of §546(a)(1) in § 216 of the 1994 Reform Act. As amended by the 1994 Reform Act, Bankruptcy Code § 546(a) now provides the following:

> An action or proceeding under §§ 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of —
>
> (1) the later of —
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702,

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2. *In re McLean Industries, Inc.*, 30 F.3d 385 (2d Cir. 1994); *U.S. Brass & Copper Co. v. Caplan (In re Century Brass Prods, Inc.)*, 22 F.3d 37 (2d Cir. 1994); *Construction Mgt. Servs., Inc. v. Manufacturers Hanover Trust Co. (In re Coastal Group, Inc.)*, 13 F.3d 81 (3d Cir. 1994); *In re Softwaire Centre Int'l, Inc.*, 994 F.2d 682 (9th Cir. 1993); *Zilkha v. Leighton*, 920 F.2d 1520 (10th Cir. 1990).

3. *In re San Joaquin Roast Beef*, 7 F.3d 1413 (9th Cir. 1993); *McCuskey v. Central Trailer Services, Inc.*, Ltd., 37 F.3d 1329 (8th Cir. 1994); *In re M & L Business Machine Company, Inc.*, 75 F.3d 586 (10th Cir. 1996).

> 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546 (1994).

Through this amendment, Congress has clarified § 546(a)(1) by establishing an outside limit for bringing avoidance actions, applicable to all parties.[4] Specifically, in a Chapter 11 case, as long as the debtor remains in possession, actions must be commenced within two years. Trustees under all chapters appointed within the initial two year period are subject to the same deadline, except that the time may be extended to allow trustees one additional year after appointment to commence actions.

The amendment renders all of the Circuit Courts' interpretations of pre-amended Code § 546(a)(1) irrelevant. This Court therefore does not need to resolve the conflict.

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4. As stated in *In re M & L Business Machine Company, Inc.*, supra, ". . . 'In light of the fact that § 546(a)(1) was amended against the backdrop of inconsistent case law and that Congress chose to underscore the importance of a statute of limitations rather than the various roles of trustees under different chapters,' [citing *In re Dryland Marina, Inc.*, 180 B.R. 487, 490 (W.D. Mich. 1995)], we consider this 1994 amendment to have been a clarification, rather than a change, in the law." *Id.* at 590.

II.

A SPLIT AMONGST THE CIRCUIT COURTS OF APPEALS IN INTERPRETING PRE-AMENDED CODE § 546(a) HAS DE MINIMIS IMPACT, AFFECTING LESS THAN 1% OF THE CASES PENDING AS OF DECEMBER 31, 1995.

Although the 1994 Reform Act is effective upon enactment, it generally does not apply to pending cases.[5] Respondent acknowledges that there are cases remaining which will be governed by the existing, and conflicting, interpretations of pre-amended § 546(a)(1). The number of these cases, however, is rapidly decreasing in time such that any remaining conflict has a de minimis impact.

After the Tenth Circuit Court of Appeals decision of *Zilkha v. Leighton*, *supra*, in 1990, the first circuit court to decide that § 546(a)(1) applied to debtors in possession, bankruptcy practitioners, professors and lecturers have advised counsel for debtors in possession and debtors in possession to file avoidance actions within two years of the entry of the order for relief. Practically speaking then, the conflict in the Circuit Courts of Appeals affects only that number of chapter 11 cases which were filed more than two years before the December 1990 *Zilkha* decision and in which the debtors are still in possession.

The Administrative Office of the United States Courts reports that of the 1,119,324 bankruptcy cases pending as of December 31, 1995, only 1.0% are chapter 11 cases filed before January 1, 1990. Further, the issue before this Court will arise only in that portion of the 1.0% of cases pending in which an avoidance action exists but has yet to be filed. Thus, given the statistically small number of cases affected by this issue, which

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5. Bankruptcy Reform Act of 1994, § 702.

continues to decrease over time, a conflict amongst the Circuits in interpreting pre-amended Code § 546 has a de minimis impact.

III.

THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY INTERPRETED PRE-AMENDED § 546(a) OF THE BANKRUPTCY CODE.

The Ninth Circuit Court of Appeals' interpretation of pre-amended Code § 546(a)(1) correctly follows the traditional rules of statutory construction, adheres to the underlying purposes of statutes of limitations, and should not be disturbed. The Ninth Circuit, in following this Court, has stated "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[6] In *In re Softwaire Centre International*, *supra*, the Ninth Circuit held that § 1107(a) by its terms subjects debtors in possession to the limitations imposed on a trustee, finding that a Chapter 11 debtor in possession is the functional equivalent of an appointed trustee. In so holding, the Ninth Circuit relied on the legislative history of § 1107 and stated:

> [Section 1107] places a debtor in possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a chapter 11 trustee. He is required to perform the functions and duties of a chapter 11 trustee (except the investigative duties). He is also subject to any limitations on a chapter 11 trustee . . . .

Softwaire Centre International, 994 F.2d at 683, citing S.

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6. *In re Softwaire Centre International*, 994 F.2d at 682 citing *Kelly v. Robinson*, 479 U.S. 36, 43, 107 S. Ct. 353, 357, 93 L. Ed. 2d 216 (1986).

Rep. No. 95-989, 95th Cong., 2nd Sess. 116 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5902. *Accord*, H. Rep. No. 95-595, 95th Cong., 2nd Sess. 404 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6360.

Further, in *In re San Joaquin Roast Beef, supra,* the Ninth Circuit, when faced with the issue of whether the statute of limitations re-starts with the appointment of a second trustee, found that the most logical interpretation of § 546(a) is that the statute of limitations begins running from the date the first trustee is appointed and that all subsequent trustees are subject to the same statute of limitations.

Thus, in this case, *where no Chapter 11 Trustee was appointed,* the Ninth Circuit correctly concluded that the statute of limitations began running at the time this case was commenced, and the conversion of the case to Chapter 7, and the appointment of a Chapter 7 Trustee, did not "start the clock ticking anew."[7]

In its petition to this Court for a writ of certiorari, Petitioner artfully argues that the decision in the present case creates a direct conflict with *In re San Joaquin Roast Beef*, and that the end result is that Chapter 11 trustees are vested with greater rights than Chapter 7 Trustees.[8] Petitioner's argument fails, however, because *San Joaquin Roast Beef* is factually distinguishable and because Petitioner ignores the underlying purpose behind the statute of limitations.

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7. *IRFM, supra,* at 780.

8. To the contrary, and as more fully discussed herein, the Ninth Circuit held in *San Joaquin Roast Beef* that the statute of limitations did not start running anew after the proceeding was converted from Chapter 11 to Chapter 7.

In *In re San Joaquin Roast Beef, supra,* a Chapter 11 Trustee was appointed within ten months after the commencement of the case. Subsequently, the case was converted to a Chapter 7 proceeding, and the appointed Chapter 7 Trustee commenced a preference action more than two years after the appointment of the Chapter 11 Trustee, arguing that it should get a new independent two year statute of limitations. The Ninth Circuit held:

> A plain reading of section 546(a) is that the two-year statute of limitations begins running from the date the first trustee is appointed and that all subsequent trustees are subject to the same two-year statute of limitations.

San Joaquin Roast Beef, 7 F.3d at 1416.

Moreover, the purposes of statutes of limitations are to bar the bringing of stale causes of actions, and to put opposing parties on notice when actions can no longer be instituted. This Court has stated "Statutes of Limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified time period and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."[9]

Since preferential transfers generally relate to the period between ninety days prior to the filing of the bankruptcy petition, or in some circumstances one year prior to bankruptcy, and since a Chapter 11 proceeding can remain pending for several years prior to being converted to a Chapter 7 proceeding, then, following Petitioner's argument, if an appointed Chapter 7

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9. *United States v. Kubrick*, 444 U.S. 111, 117, 100 S. Ct. 352, 356 (1979).

Trustee is given two additional years to bring preference actions, said actions can occur five, ten, or even more years after the commencement of the bankruptcy case.[10]

This was a concern to the Court in *In re Tusa Florida, Inc.*, 186 B.R. 542, 545 (S.D. Fla. 1995), when it stated "A ruling that the two-year limitations period could run anew upon the appointment of a trustee subsequent to a debtor in possession could lead to absurd results. For example, a debtor may be a debtor in possession for six years. Thereafter, if a trustee is appointed, opposing parties could be subject to a new two-year statute of limitations. . . . These results are clearly contrary to the purposes of the statute of limitations."[11]

In fact, it is apparent that Congress recognized the need for finality and certainty under § 546 when it amended § 546(a) to make it clear that the limitations period runs from the later of two

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10. In the instant case, for example, the transactions which were alleged to be preferential transfers took place during the period of July 22, 1987 through July 21, 1988. The Chapter 11 proceeding was commenced on July 22, 1988. On October 3, 1989, the case was converted to a Chapter 7 proceeding, and on October 11, 1991, or approximately four years after the alleged preferential transfers took place, the underlying action was commenced. *It should be noted that after a trial on the merits, the Bankruptcy Court ruled in favor of Respondent, finding that the transfers were made in the ordinary course of business and, therefore, not preferential under § 547(c).*

According to the Administrative Office of the United States Courts, there are presently Chapter 11 cases still pending which were commenced shortly after the effective date of the Bankruptcy Reform Act of 1978 (October 1, 1979). Thus, following Petitioner's argument, it is possible that an avoidance action could be commenced today by a Chapter 7 Trustee, under the pre-amended § 546, for a transaction that occurred close to twenty years ago.

11. *See also In re Luria Steel and Trading Corporation*, 164 B.R. 293 (Bankr. N.D. Ill. 1994).

years from the entry of the Order for Relief or one year from the date of the appointment or election of the first trustee if such trustee is appointed or elected within two years of the entry of the Order for Relief. In other words, under amended § 546(a), the statute of limitations will not extend beyond three years from the filing of the petition.

Thus, the Ninth Circuit reached the correct result in its interpretation of § 546(a)(1), and the soundness of its decision argues against review by this Court.

CONCLUSION

The Ninth Circuit Court of Appeals correctly held that the two-year statute of limitations period imposed pursuant to pre-amended Code § 546(a) applies to debtors in possession, and that a new two year limitations period was not created as a result of the conversion of the underlying case to a Chapter 7 proceeding or the appointment of a Chapter 7 Trustee. Likewise, the Bankruptcy Reform Act clarified Code § 546(a) to resolve the conflict that exists amongst the various circuits; thus, any remaining conflict amongst the Circuits affects only a small number of cases which continues to decrease with time.

WHEREFORE, for the reasons set forth herein, Respondent requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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